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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/039,111	01/04/2002	Venkatesh R. Iyer	NAIIP066/01.308.01	8633
758	7590	08/07/2006	EXAMINER	
FENWICK & WEST LLP SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041			SWEARINGEN, JEFFREY R	
		ART UNIT	PAPER NUMBER	
			2145	

DATE MAILED: 08/07/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/039,111	IYER ET AL.
	Examiner	Art Unit
	Jeffrey R. Swearingen	2145

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 22 May 2006.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-9, 11, 13-22, 24, 26, 27, 29 and 30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-9, 11, 13-22, 24, 26, 27, 29 and 30 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    - a) All
    - b) Some \*
    - c) None of:
      1. Certified copies of the priority documents have been received.
      2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
      3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|  | 6) <input type="checkbox"/> Other: _____                                    |

## DETAILED ACTION

### *Response to Arguments*

1. Applicant's arguments filed 5/22/06 have been fully considered but they are not persuasive.
2. As noted in the rejection under 35 U.S.C. 112, second paragraph, Applicant failed to give any reasonable definition of "application verb" during prosecution as of this action. The specification is consulted to provide Applicant's definition of "application verb".
3. Original Specification, page 4, lines 10-11. "In the context of the present description, an 'application verb' may include any specific application transaction or transaction type."
4. Original Specification, page 9, lines 2-3. "Examples of application verbs will be set forth later."
5. Original Specification, page 15, lines 13-17. "It is then determined whether the verb is valid in decision 606. A verb is valid based on predetermined criteria. For example, an acknowledgement (ACK) may not be a valid verb, while a GET request may be considered valid. In general, the criteria may be such that the only verbs that are monitored are those for which response times are desired."
6. As the above examples illustrate, there is no reasonable definition in the original specification for an "application verb", and no assistance beyond the vague ACK and GET example on page 15 is provided for one of ordinary skill in the art to even grasp what an "application verb" consisted of. One of ordinary skill in the art cannot determine the validity of an application verb based on the filed specification, at least because one of ordinary skill in the art would not be able to figure out what Applicant meant an "application verb" to encompass.
7. Applicant's reference to the cited portion in page 15 of the original specification failed to give any indication to one of ordinary skill in the art how to ascertain the validity of an application verb. Applicant merely provided the suggestion that one "verb" may be valid and another "verb" may not be valid, without giving any indication how said decision was reached.
8. The same problem applied to the validity of the state machine. Applicant stated the state machine was either valid or not valid, but never gave any indication allowing one of ordinary skill in the art to understand how either the invention or Applicant's own thinking ascertained the validity of the state machine.

Art Unit: 2145

machine or lack thereof. Applicant's arguments presented on page 12 of the 5/22/2006 remarks are presenting information about the invention that is not present in the specification.

9. Applicant claimed the Office Action misstated the claim limitations of "aggregating packet data into flows" and "aggregating the packet data into a flow" as "separating data from a packet into multiple flows". It does not matter whether Applicant's language or the statement by the Office is correct in this situation. All of the above statements are not taught by the original specification as cited by Applicant. One of ordinary skill in the art would not be able to decipher the general concepts presented by "aggregating packet data into flows" from the cited portion of the specification. No data aggregation is taught, and no data aggregation can be logically interpolated, interpreted, or even construed from the specification.

10. Applicant argued the claims were read incorrectly in regard to the updating of a state machine. Unfortunately, Applicant's state machine would be constructed in a computing environment that would permit race and state error conditions to exist based upon the current design as presented by Applicant. In order for the state machine to accurately function, it must stabilize for a period of time after any updates have occurred to the state machine to give accurate results. Applicant did not provide for this. Applicant's method taught the immediate determination of the validity of a state machine, without giving adequate time to allow any state machine updates to occur. This would allow invalid information to be stored if the state machine were determined to be in a valid state when it was being updated to be in an invalid state, and vice versa. Where the determination is not important in the construction of the claims; rather, it is crucial to know when the determination occurred in order to make the invention viable.

11. These reasons uphold the rejection under 35 U.S.C. 112, first paragraph. These reasons also uphold the rejection of the amended claims under 35 U.S.C. 112, second paragraph, as one of ordinary skill in the art is unable to ascertain how Applicant determined the validity of the application verbs "if predetermined criteria indicate that response times of the application verbs should be measured."

12. In light of this reading of the specification and claims, the Dietz reference fulfills the claim language. Applicant is referred to paragraph 28 of the non-final action of 2/22/2006, which stated that

Art Unit: 2145

every item Applicant claimed Dietz failed to teach was missing from Applicant's originally filed specification.

13. Applicant argued Dietz failed to disclose "determining whether the state machine is in a valid state". If the packet was received, then logically the state machine was determined to be in a valid state.

14. Applicant argued Dietz failed to disclose "responsive to determining that the state machine is in a valid state...storing the information related to the application verbs". As stated above, the receipt of a packet meant that the state machine was in a valid state. *Ergo*, if every packet was stored in Dietz, this was done "responsive to determining that the state machine is in a valid state."

15. Applicant argued Dietz failed to disclose "the application verbs being valid if predetermined criteria indicate that response times of the application verbs should be measured." See column 11, lines 55-58.

16. The Examiner admits an error in the previous rejection. The art was not applicable under 35 U.S.C. 102(b), but was applicable under 35 U.S.C. 102(e). This correction is shown below.

#### ***Claim Rejections - 35 USC § 112***

17. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

18. Claims 1-9, 11, 13-22, 24, 26-27 and 29-30 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Applicant failed to describe in the specification how validity was determined for an application verb or a state machine or what validity consisted of. Applicant failed to describe in the specification how data from a packet would be separated into multiple flows.

19. Claims 1-9, 11, 13-22, 24, 26-27 and 29-30 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not

Art Unit: 2145

described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. As currently amended, the language of claims 1, 14, and 27 refers to *updating a state machine determining whether the state machine is in a valid state*. It is not possible to update a state machine that determines whether said state machine was in a valid state, since such updating would prevent said state machine from performing said determination accurately.

20. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

21. Claims 1-9, 11, 13-22, 24, 26-27 and 29-30 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

22. Applicant defined application verb as being any transaction. One of ordinary skill in the art would be unable to ascertain what was used as the benchmark to determine validity of an application verb. Multiple interpretations exist of this concept, including validity based on a numeric value, validity based upon the complete error free receipt of a data transmission, validity based on the result of the transaction, validity based upon comparing the content of a data transmission to a table, and validity based upon the parameters of the flow.

#### ***Claim Rejections - 35 USC § 102***

23. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Art Unit: 2145

24. Claims 1-9, 11, 13-22, 24, 26-27, and 29-30 are rejected under 35 U.S.C. 102(e) as being anticipated by Dietz (U.S. Patent No. 6,839,751).

25. In regard to claims 1, 14, and 27, Dietz disclosed *receiving packet data; aggregating the packet data into flows; identifying application verbs and information relating to them associated with the flows; determining whether the application verbs are valid, the application verbs being valid if predetermined criteria indicate that response times of the application verbs should be measured; responsive to determining that the application verbs are valid, updating a state machine determining whether the state machine is in a valid state; and responsive to determining that the state machine is in a valid state, storing the information relating to the application verbs, wherein the information relating to the application verbs is capable of being used to calculate response times associated therewith.* In column 7, lines 53-65, an embodiment was presented wherein the packet was examined to produce a signature relating the packet to a network flow. This signature was compared with future packets, or *determining whether the application verbs are valid.* If the signature was a new application, the signature was created, *updating a state machine responsive to determining whether the state machine is in a valid state.* See further column 11, lines 59-63, where *responsive to determining that the state machine is in a valid state, storing the information relating to the application verbs.* See further Abstract; column 2, lines 11-27; column 2, lines 44-46; column 4, lines 14-33; column 5, line 65 – column 6, line 19; column 11, lines 11-58; column 12, lines 55-65; column 13, lines 1-27; column 22, line 61 – column 23, line 6; column 31, lines 25-47; column 32, lines 1-51.

26. In regard to claims 2 and 15, Dietz further disclosed *determining whether the packet data is associated with a new flow.* See Dietz, column 4, lines 26-30.

27. In regard to claims 3 and 16, Dietz further disclosed *if the packet data is determined to be associated with a new flow, further comprising creating a flow, creating a data structure, and inserting the data structure into the flow.* See Dietz, column 4, lines 16-20; column 9, lines 40-58.

Art Unit: 2145

28. In regard to claims 4 and 17, Dietz further disclosed *identifying a protocol identifier associated with the flow, and determining a number of known application verbs associated with the protocol identifier.*

See Dietz, column 6, lines 20-35; column 7, lines 53-65; column 9, lines 27-67; column 11, lines 30-36.

29. In regard to claims 5 and 18, Dietz further disclosed *allocating memory for the data structure based on the number of known application verbs associated with the protocol identifier.* See Dietz, column 11, lines 30-36.

30. In regard to claims 6 and 19, Dietz further disclosed *the number of application verbs associated with the protocol identifier is determined utilizing a map.* See Dietz, column 27, line 41 – column 28, line 55.

31. In regard to claims 8 and 21, Dietz further disclosed *inserting a data structure into the flows.* See Dietz, column 4, lines 16-20; column 9, lines 40-58.

32. In regard to claims 9 and 22, Dietz further disclosed *populating and updating the data structure with the information.* See Dietz, column 9, lines 40-58.

33. In regard to claims 11 and 24, Dietz further disclosed *determining whether a response is complete, and calculating a response time if it is determined that the response is complete.* See Dietz, column 22, line 61 – column 23, line 10; column 40, lines 26-52.

34. In regard to claims 13 and 26, Dietz further disclosed *the information relating to the application verbs is capable of being used to calculate response times associated therewith in real-time.* See Dietz, column 32, lines 1-51.

35. The limitations of claim 30 are embodied within claims 1-6, 8-9, and 11.

#### ***Claim Rejections - 35 USC § 103***

36. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Art Unit: 2145

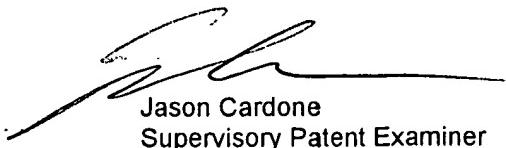
37. Claims 7, 20 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dietz.
38. In regard to claims 7 and 20, Dietz did not explicitly state the use of RMON. Dietz described that avoiding the use of RMON will improve performance in the system in column 34, lines 61-67. It would have been obvious to one of ordinary skill in the art at the time of the invention to use RMON with Dietz since Dietz stated that he found a way to avoid using RMON in order to improve system performance. Therefore, according to Dietz, the use of RMON was an older technological variant of the Dietz invention.
39. Claim 29 has substantially the same limitations as claims 1 and 4-7.

#### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey R. Swearingen whose telephone number is (571) 272-3921. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jason Cardone can be reached on 571-272-3933. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Jason Cardone  
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Art Unit 2145